Supreme Court, U.S.
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NO. 92-196

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

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LEONOR GARCIA GARCIA
Petitioner

v.

TEXAS DEPARTMENT OF HUMAN SERVICES, et al.,

Respondents

****

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General for Litigation

JORGE VEGA, Chief
General Litigation Div.

AMY R. CASTANEDA
Asst. Atty. Gen.
OF COUNSEL

JAMES C. TODD,
Appellate Coordinator
COUNSEL OF RECORD

QUESTIONS PRESENTED

Whether the "law of the case" doctrine barred United States District Judge Emilio M. Garza from presiding over and ruling on Respondents' Motion for Summary Judgment.

Whether the Court should deny certiorari because the Fifth Circuit was correct in its determination that petitioner's subsequent case against the Texas Department of Human Services and Patricia Byrnes was barred by the doctrine of res judicata.

Whether petitioner's Equal Protection and Due Process claims were properly dismissed where petitioner failed to allege material elements and provided insufficient evidence in support of her constitutional claims.

Whether the Fifth Circuit was correct in its decision to uphold the district court's determination that petitioner failed to satisfy the elements of the Texas common law tort of intentional infliction of emotional distress.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

ARGUMENT FOR DENIAL OF THE WRIT 4

I. This Court should deny certiorari because the "law of the case" doctrine did not bar United States District Judge Emilio M. Garcia from presiding over and ruling on respondents' motion for summary judgement.

II. This Court should deny certiorari 6
because the Fifth Circuit was correct in its determination that petitioner's subsequent case against the Texas Department of Human Services and Patricia Byrnes was barred by the doctrine of res judicata.

III. This Court should deny certiorari because the Fifth Circuit was correct in upholding the district court's determination that petitioner failed to allege material elements and provided insufficient evidence in support of her equal protection and due process claims. 11

IV. This Court should deny certiorari because the Fifth Circuit was correct in its decision that petitioner failed to satisfy the elements of the Texas common law tort of intentional infliction of emotional distress. 15

Conclusion 18

TABLE OF AUTHORITIES

SUPREME COURT CASES	PAGE
Allen v. McCurry, 449 U.S. 92, 101 S.Ct. 411 (1980).	7
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986).	12
Baldwin v. Traveling Men's Assn., 283 U.S. 522, 51 S.Ct. 517 (1931).	10
Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972).	13
Brown v. Felsen 442 U.S. 127, 99 S. Ct. 2213 (1979).	7
Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986).	12
Commissioner v. Sunnen, 333 U.S. 591, 68 S.Ct. 715 (1948).	7
Cromwell v. County of Sac, 94 U.S. 351 (1877).	8
Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662 (1986).	13
Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668 (1986).	13

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938). 15

Federated Department Stores, Inc. v. Moitie, 452 U.S. 392, 101 S.Ct. 2424 (1981). 7, 10

Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962). 8, 9

Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 37 S.Ct. 506 (1917). 10

Heiser v. Woodruff, 327 U.S. 726, 66 S.Ct. 853 (1946). 7, 10

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 572, 106 S.Ct. 1348 (1986). 11

Morris v. Jones 329 U.S. 545, 67 S. Ct. 452 (1947). 7

Parklane Hosiery Co. v. Shore 439 U.S. 322, 99 S. Ct. 645 (1979). 7

United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993 (1962). 11

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555 (1977). 12

Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976). 12

Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321; 91 S.Ct. 795 (1971). 9

FIFTH CIRCUIT CASES PAGE

Blankenship v. Kerr County, 878 F2d 893 (5th Cir. 1989). 16

Dean v. Ford Motor Credit Co., 885 F.2d 300 (5th Cir. 1989). 16, 17

Matter of Howe, 913 F.2d 1138 (5th Cir. 1990). 7

Wilson v. Monarch Paper Co., 939 F2d 1138 (5th Cir. 1991). 15, 16, 17

TEXAS CASES PAGE

Brown v. American Transfer & Storage Co., 601 S.W.2d 931, (Tex.), *cert denied*, 449 U.S. 1015; 101 S.Ct. 575 (1980). 15

Tidelands Auto Club v. Walters, 699 S.W.2d 939 (Tex. App.--Beaumont 1985, *writ ref'd n.r.e.*), *error refused n.r.e.* (1986). 15, 16

CONSTITUTIONAL PROVISIONS	PAGE
U.S. Const. Amend. XIV	1

RULES AND STATUTES	PAGE
42 U.S.C. § 1983	1, 13
Fed. R. Civ. P. 15(a)	1
Fed. R. Civ. P. 54(a)	1
Fed. R. Civ. P. 56(c).	12

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RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are at issue: U.S. Const. Amend. XIV; 42 U.S.C. § 1983; Fed. R. Civ. P. 54(a); and Fed. R. Civ. P. 15(a).

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Court Below.

In January of 1989, petitioner filed civil action no. SA-88-CA-1399 ("*Garcia I*") in the United States District Court for the Western District of Texas, San Antonio Division,

against the Texas Department of Human Services ("TDHS") as well as clerical supervisor Patricia Byrnes,[1] alleging that she was not promoted to a clerk III position because of her age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* The case proceeded to trial before United States District Judge Emilio M. Garza on October 23, 1989. On October 25, 1989, Judge Garza issued findings of fact and conclusions of law. The court entered judgment for respondent disposing of petitioner's age discrimination claims on November 17, 1989.

On October 30, 1989, only five days after Judge Garza had read his findings of fact and conclusions of law to the parties, petitioner filed the action on which this appeal is based ("*Garcia II*") naming TDHS and Patricia Byrnes, acting both in her official and individual capacities, as defendants. Petitioner's second suit asserted claims under the ADEA based on respondent's alleged retaliation against petitioner for filing complaints with the Equal Employment Opportunity Commission, ("EEOC") and a civil action.

On August 2, 1991, Judge Garza granted respondent's motion for summary judgment finding that petitioner's claims against TDHS and Patricia Byrnes, acting in her official capacity, were barred by the doctrine of res judicata. The district court further concluded that insufficient evidence had been presented to support petitioner's allegation that Patricia Byrnes, acting in her individual capacity, had violated petitioner's equal protection and due process rights.

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[1] Patricia Byrnes was a named defendant in the original and first amended complaints, but was dropped in petitioner's subsequently amended complaints.

Petitioner's tort claim of intentional infliction of emotional distress failed on the same grounds.

II. Statement of Facts.

In its order granting summary judgment, the court below found the following facts: plaintiff was employed by TDHS on August 1, 1984. Defendant Patricia Byrnes was plaintiff's supervisor at TDHS during the term of her employment from 1984 through 1988. On September 11, 1986, plaintiff filed an age discrimination complaint against TDHS with EEOC, alleging that she had been denied promotions by defendants Byrnes and TDHS solely because of her age.

In February 1987, plaintiff took extended medical leave through January 4, 1988. During her leave, plaintiff was contacted on one occasion by defendant Byrnes regarding plaintiff's need to notify TDHS of her reason for continued absence in accordance with TDHS policy. Plaintiff considered this contact retaliation and filed charges with the EEOC against Byrnes and TDHS on June 30, 1987.

On December 4, 1987, while plaintiff was on extended leave, there is some evidence that initial steps were taken to terminate plaintiff. Defendant Byrnes completed a "Supervisor Report of Employee Separation" in which she stated that plaintiff's services were unsatisfactory, that plaintiff did not adhere to work rules, that plaintiff did not meet job requirements, that plaintiff had a poor attitude toward her work, and that she did not get along well with her co-workers. These preliminary termination actions did not become effective and plaintiff was never notified of the proceedings. Plaintiff returned to work on January 4, 1988 at

which time she was placed in the position of intake clerk; the same position she had held since 1985.

On January 22, 1988, plaintiff participated, along with four other TDHS employees, in an exercise to determine qualification for four upgraded clerk III positions. As a result of her performance in the job competition, on February 9, 1988, plaintiff was reassigned from her position as intake clerk to the position of filer/puller, the remaining position for which plaintiff was qualified. Plaintiff terminated her employment with TDHS on May 15, 1988.

It is apparent from the face of Leonor Garcia's Petition for Writ of Certiorari that complex issues of law are not presented for review. Instead, petitioner seeks re-examination of facts which have been carefully scrutinized on three occasions; twice at the trial court level and once on appeal. While petitioner may be displeased with the results, she has had her day in court and presents no issues in her petition for Writ of Certiorari which are proper for Supreme Court review.

REASONS FOR DENYING THE WRIT

ARGUMENT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE "LAW OF THE CASE" DOCTRINE DID NOT BAR UNITED STATES DISTRICT JUDGE EMILIO M. GARZA FROM PRESIDING OVER AND RULING ~~ON~~ RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

The Fifth Circuit properly concluded that United States District Judge Edward C. Prado's denial of

respondents' motion for Judge Emilio M. Garza to preside over the case did not constitute the "law of the case."

On October 25, 1989, United States District Judge Emilio M. Garza issued findings of fact and conclusions of law in *Garcia I*. Final judgment was entered on November 17, 1989. On October 30, 1989, petitioner filed *Garcia II* which was assigned to United States District Judge Edward C. Prado. Respondent, recognizing that the facts at issue in *Garcia II* were essentially the same as those previously decided by Judge Garza, filed a motion for Judge Garza to preside over the case. Judge Prado denied respondents' motion on January 25, 1990.

Judge Prado's decision not to reassign the case to Judge Garza's court serves as the basis for petitioner's first point of contention. Specifically, petitioner maintains that Judge Prado's denial of respondents' motion constituted the "law of the case" which precluded Judge Garza's further participation thereby rendering his subsequent ruling in *Garcia II* a nullity. In particular, petitioner contends that Judge Prado's January 25, 1990, order constituted a final judgment which became binding precedent to be followed during the successive course of the litigation.

Judge Prado's denial of respondents' motion for Judge Garza to preside was discretionary and not based on judicial precedent or statutory construction. Judge Prado did not apply a rule of law but instead relied on his determination that he was equally capable and Judge Garza was in no better position to address respondents' res judicata and collateral estoppel claims. Judge Prado's denial of respondents' motion, not having been based on an issue of law but rather having been made on a discretionary basis, did not become the law of the case so as to preclude reassignment to Judge Garza.

As the Fifth Circuit correctly concluded, Judge Prado's original ruling denying respondents' motion to reassign *Garcia II* to Judge Garza was technically an "order." Petitioner mistakenly construes this order as a *ruling* which, under the law of the case doctrine, could not be reconsidered. Clearly, there can be no "law of the case" where there is no ruling on the *law*. The fact that Judge Prado's decision was rooted in administrative convenience rather than judicial precedent or statutory construction, precludes the validity of the argument that Judge Garza improperly presided over *Garcia II*.

Thus, Judge Prado's decision not to transfer *Garcia II* to Judge Garza's court did not preclude Judge Prado's later reassignment of the case to Judge Garza on August 23, 1990, when it was determined that Judge Prado would no longer preside in the United States District Court, for the Western District of Texas, Del Rio Division.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE FIFTH CIRCUIT WAS CORRECT IN ITS DETERMINATION THAT PETITIONER'S SUBSEQUENT CASE AGAINST THE TEXAS DEPARTMENT OF HUMAN SERVICES AND PATRICIA BYRNES WAS BARRED BY THE DOCTRINE OF RES JUDICATA.

The doctrine of res judicata precludes relitigation where: 1) the parties to the judgment are identical in both suits; 2) the prior judgment was rendered by a court of competent jurisdiction; 3) a final judgment on the merits was rendered; and 4) the same cause of action was involved in

both cases.[2] The Fifth Circuit concluded, and petitioner does not dispute that the parties were identical in both suits and *Garcia* I was a final judgment rendered by a court of competent jurisdiction. Petitioner maintains, however, that the two cases involved different causes of action.

As the trial court correctly noted, the Fifth Circuit has adopted the "transactional test" of the Restatement (Second) of Judgments for determining whether two suits involve the same claim for res judicata purposes. Following this approach, the key issue is not the relief requested nor the theory asserted but whether plaintiff bases the two actions on the same nucleus of operative facts. Thus, res judicata "bars all claims that were or *could have been* advanced in support of the cause of action on the occasion of its former adjudication, ... not merely those that were adjudicated." *Matter of Howe*, 913 F.2d 1138, 1144 (5th Cir.) *See Allen v. McCurry*, 449 U.S. 92, 94, 101 S.Ct. 411, 414 (1980); *Federated*, 452 U.S. at 398, 101 S.Ct. at 2428 (1981) (A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.); *Commissioner v. Sunnen*, 333

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[2] *See generally Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424 (1981); *Brown v. Felsen*, 442 U.S. 127, 139, n 10, 99 S.Ct. 2205, 2213 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327, n 5, 99 S.Ct. 645 (1979); *Commissioner v. Sunnen*, 333 U.S. 591, 68 S.Ct. 715 (1948); *Morris v. Jones*, 329 U.S. 545, 67 S.Ct. 451 (1947); *Heiser v. Woodruff*, 327 U.S. 726, 66 S.Ct. 853 (1946).

U.S. at 597, 68 S.Ct. at 719 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353 (1877).

Upon careful review of petitioner's second cause of action the trial court properly determined that although the theories of recovery were different, all of the actions upon which both suits were based occurred during the same period of petitioner's employment at TDHS. Thus, the trial court inquired whether petitioner should have asserted all of her claims in the previous litigation. It determined, "there is no reason why plaintiff should not or could not have asserted the claims in the first suit that she now presents." In further support the trial court determined that petitioner realized she could have, and indeed attempted to, amend her complaint to include the retaliation claim; however, petitioner's motion to amend was denied as untimely by the trial court in *Garcia I.*

Petitioner argues that the district court abused its discretion by denying her fourth motion for leave to amend and that the court, not petitioner, precluded her from litigating her causes of action in the same proceeding. In other words, petitioner argues that the court "split the litigation" by denying her motion to amend, thus precluding the effects of res judicata.

Respondent agrees with the Fifth Circuit that petitioner cannot evade the full force of res judicata by insisting that the district court's refusal to let her amend her complaint for the fourth time prevented her from raising all of her claims in *Garcia* I.

Petitioner relies on *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227 (1962), for the proposition that the district court abused its discretion by not allowing petitioner to freely amend her petition for the fourth time. In *Foman*, this Court found that a district court had abused its discretion by

refusing to permit amendment of a complaint. This Court expressly recognized, however, that leave to amend should be freely given except in those situations where plaintiff repeatedly failed to cure deficiencies by previously allowed amendments. *Foman*, 371 U.S. at 182, 83 S.Ct. at 230. More importantly, this Court emphasized that the "grant or denial of an opportunity to amend is within the discretion of the district court...." *Id.* While it is clear that outright refusal to grant leave without any justifying reason is not a proper exercise of discretion, the trial court was justified in not granting petitioner leave to amend for the fourth time where petitioner had been given *three* previous opportunities to assert all claims and where she attempted to amend her complaint ninety-seven days following the court imposed deadline.

Federal district courts are charged with the authority and responsibility to grant leave to amend when justice so requires. That decision is left to the sound discretion of the district court and is only to be reversed on appeal when that discretion has been abused. *Foman*, 371 U.S. at 182, 83 S.Ct. at 230; *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 802 (1971). The Fifth Circuit determined that the lower court did not abuse its discretion by denying petitioner's fourth motion for leave to amend her complaint when the delay between the accrual of the cause of action and that motion spanned more than two years, and where the motion was denied as untimely.

Respondent agrees with the Fifth Circuit's determination that because petitioner failed to adhere to the scheduling deadline set by the court, she is to blame for not bringing all her claims in the first proceeding. Thus, the Appellate Court explained:

> The doctrine of *res judicata* contemplates, at a minimum, that courts be not required to adjudicate, nor defendants to address, successive actions arising out of the same transaction, asserting breach of the same duty. To reward [Garcia] for her own delinquency by permitting her to maintain this action would be clearly at variance with this principle. We decline to do so.

In sum, petitioner has had her day in court and *Garcia II* was properly barred by the doctrine of res judicata. As this Court has recognized, there is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." *Federated*, 452 U.S. at 401, 101 S.Ct. at 2429 (quoting *Heiser*, 327 U.S. at 733, 66 S.Ct. at 856, (1946)). Moreover, this Court has long maintained that:

> "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 518 (1931). We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts...." *Hart Steel Co. v.*

> *Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 507 (1917).

Petitioner sets forth no valid arguments for reversing the determination that the claims raised in *Garcia II* were improperly barred by the doctrine of *res judicata*.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE FIFTH CIRCUIT WAS CORRECT IN ITS DETERMINATION TO UPHOLD THE DISTRICT COURT'S FINDING THAT PETITIONER FAILED TO ALLEGE MATERIAL ELEMENTS AND PROVIDED INSUFFICIENT EVIDENCE IN SUPPORT OF HER EQUAL PROTECTION AND DUE PROCESS CLAIMS.

The standard for summary judgment review as established by this Court and properly applied by the Fifth Circuit recognizes that:

> On summary judgment the inferences to be drawn from the underlying facts .... must be viewed in the light most favorable to the party opposing the motion.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 572, 587, 106 S.Ct. 1348, 1356 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962)). Even when this strict standard was applied in petitioner's favor, the Fifth Circuit found that petitioner failed to present any evidence which would support her constitutional claims. Petitioner maintains nonetheless that the Fifth Circuit

"erroneously believ[ed] that petitioner ... must prove up her claim without the benefit of a trial by jury." Petitioner's Brief at p. 22.

The Fifth Circuit did not apply an erroneous standard. For summary judgment to be granted, the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, must demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *See also*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53 (1986). By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no *genuine* issue of *material* fact. The court must, and did, therefore, look to the applicable substantive law to identify which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510 (1986).

Applying this standard to petitioner's equal protection claim, the Appellate Court upheld the trial court's finding that petitioner failed to present any evidence that respondent Byrnes intentionally discriminated against her. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264, 97 S.Ct. 555, 563 (1977) (citing *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040 (1976)). Furthermore, it was determined that petitioner did not even show that Byrnes subjected her to unequal treatment. Consequently, even assuming the truth of petitioner's allegations, she failed to satisfy the applicable standard.

In support of her equal protection claim, petitioner maintains that she was terminated without notice and was not afforded the right to be present at an exit interview.

Petitioner's Brief at p. 23. As the trial court aptly pointed out; "with respect to plaintiff's claims that she was terminated without a hearing and that her exit interview was conducted in her absence, plaintiff presents no proof to support her assertions of unequal treatment." More importantly, the trial court and Fifth Circuit recognized that while an exit interview took place on December 4, 1987, petitioner returned to work on January 4, 1988. Thus, Judge Garza determined, and the Fifth Circuit agreed, that "even if plaintiff had produced any evidence that she was treated differently than other similarly situated individuals, plaintiff was not terminated and, therefore, it is not clear that the lack of a hearing and the manner in which the exit interview was conducted could amount to a constitutional violation." In sum, petitioner provided no evidence that respondents' actions were motivated by impermissible motives or illegitimate ends.

Similarly, petitioner failed to present evidence of a due process violation. It is undisputed that in order to state a cause of action for violation of the Due Process Clause under § 1983, a plaintiff must assert a recognized property interest within the purview of the Fourteenth Amendment, *Board of Regents v. Roth*, 408 U.S. 564, 571, 92 S.Ct. 2701 (1972), and that she was intentionally or recklessly deprived of that interest under color of state law. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 347-48, 106 S.Ct. 668, 670 (1986).

Petitioner maintains that she was "entitled" to be placed in a Clerk III position which constituted a property interest. Petitioner's Brief at p. 26. In support, petitioner relies on the Texas Department of Human Services' Manual § 1000-1924 asserting that this section entitled her to the clerk III position on January 4, 1988. This section provides in pertinent part, "The incumbent is promoted *if* [s]he meets

minimum qualifications. If [s]he does not, the personnel officer tries to locate another appropriate job class in the highest salary group ... for which the employee qualifies." (emphasis added). Petitioner cannot reasonably assert that this regulation "entitles" her to the clerk III position. Clearly an incumbent is only promoted *if* she meets the minimum qualifications. The evidence presented to the trial court established that petitioner was not promoted to the clerk III position and remained in a filer/puller position because that position offered petitioner the highest salary for which she was qualified.

The Fifth Circuit agreed with the trial court's finding that petitioner presented no evidence whatsoever to support her contention that promotion to the clerk III position was supposed to be automatic under TDHS regulations. Even accepting this statement as true, however, the Appellate Court affirmed the lower court's determination that there was no indication that respondent Byrnes intentionally or recklessly deprived petitioner of an alleged property interest. Based on the record, it is not possible for petitioner to assert a violation of her due process rights against respondent Byrnes, acting in her individual capacity. As the trial court pointed out and the Fifth Circuit agreed, "plaintiff's claim ... must fail because Byrnes is not the person who made the decision to upgrade the positions and to have the inhouse competition to fill them. These decisions were made by Carol Kelly. Thus, plaintiff has sued the wrong person."

Respondent agrees with the Appellate Court's finding that petitioner's due process argument must fail given that petitioner neither specifically alleged that she had a property interest in continued employment with TDHS nor did she present any evidence that respondent Byrnes intentionally or recklessly deprived her of that interest.

IV. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE FIFTH CIRCUIT WAS CORRECT IN ITS DECISION THAT PETITIONER FAILED TO SATISFY THE ELEMENTS THE TEXAS COMMON LAW TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Petitioner asserts that the district court erred in granting summary judgment on her claim of intentional infliction of emotional distress on the grounds that the record before the court was sufficient to create a factual dispute. In support of this argument, petitioner points to conclusory statements set forth in her affidavit submitted in response to respondent's motion for summary judgment. Specifically, petitioner points to her assignment as a filer/puller and her alleged termination on December 4, 1988 as evidence that respondent Byrnes acted with intent to cause her injury and emotional distress. The summary judgment evidence produced by petitioner did not support her tort claim.

The Fifth Circuit has recognized that a claim for intentional infliction of emotional distress is a pendent state law claim and, therefore, the court must apply the law of Texas in determining whether respondents' motion should have been granted.[3] *See generally Erie R.R. Co. v. Tompkins*,

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[3] *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1142 (5th Cir. 1991). While the Texas Supreme Court has not expressly recognized this tort, *see e.g., Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 939 (Tex.), *cert. denied*, 449 U.S.

304 U.S. 64, 78, 58 S.Ct. 817, 822 (1938). To prevail on a claim for intentional infliction of emotional distress, Texas law requires, and the trial court properly considered, four elements:

1. whether the defendant acted intentionally or recklessly;
2. whether the conduct was "extreme and outrageous;"
3. whether the actions of the defendant caused the plaintiff emotional distress; and
4. whether the emotional distress suffered by the plaintiff was severe.

Wilson, 939 F.2d at 1142 (citing *Dean*, 885 F.2d at 306 (quoting *Tidelands*, 699 S.W.2d at 942)).

Applying these principles, the district court properly found that petitioner had not established that respondent Byrnes assigned her to the filer/puller position with the intention of causing petitioner injury or with conscious disregard for the potential effects of the assignment. "[R]ather than as a result of some malicious scheme," the trial court noted, "plaintiff was assigned to the position of filer/puller, the only remaining Clerk II position, by default because she

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1015, 101 S.Ct. 575, (1980), the Fifth Circuit has recognized that such a cause of action exists in Texas based on the Texas Court of Appeal's decision in *Tidelands Auto Club v. Walters*, 699 S.W.2d 939 (Tex. App.--Beaumont 1985, *writ ref'd n.r.e.*), *error refused n.r.e.* (1986). *See Blankenship v. Kerr County*, 878 F.2d 893, 898 (5th Cir. 1989) and *Dean v. Ford Motor Credit Co.*, 885 F.2d 300 (5th Cir. 1989)).

was rated the lowest out of the five clerks competing for the position...."

Even assuming that petitioner could make an argument that respondent had acted intentionally, petitioner offered no evidence of extreme and outrageous conduct. While the Fifth Circuit has concluded that "extreme and outrageous" conduct is an amorphous phrase that escapes precise definition, it has offered some clarification:

> Liability [for outrageous conduct] has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.... Generally, the case is one in which a recitation of the facts to an average member of the community would lead him to exclaim, "Outrageous."

Wilson, 939 F.2d at 1142. Personnel decisions made in the ordinary course of business rarely give rise to a claim of extreme and outrageous conduct. The *Wilson* court recognized that to properly manage its business, "every employer must on occasion review, criticize, demote, transfer, and discipline employees." Thus, except in the most unusual cases this type of action does not rise to the level of "extreme and outrageous" conduct. *Wilson*, 939 F.2d at 1143. Applying this standard, respondent Byrnes' alleged actions do not rise to the level of extreme and outrageous conduct as set forth by the Fifth Circuit in *Wilson* or *Dean*. Nor has petitioner presented any evidence that respondent Byrnes intentionally

or recklessly placed her in jobs that aggravated her back injury.

CONCLUSION

Respondent respectfully requests that this Court deny Petitioner's Writ of Certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

JORGE VEGA, Chief
General Litigation Division

JAMES C. TODD
Assistant Attorney General
Appellate Coordinator
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548
COUNSEL OF RECORD

AMY R. CASTANEDA

Assistant Attorney General
General Litigation Division
OF COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent on this the 19th day of August, 1992, to:

Richard O. Gonzales
621 W. Main
Uvalde, Texas 78801

James C. Todd

JAMES C. TODD
Assistant Attorney General